Supreme Court, U. S.
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No. 95-1285

In The

Supreme Court of the United States

October Term, 1995

ROBERT WILSON,

Petitioner,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has properly demonstrated that the September 13, 1995 decision of the United States Court of Appeals for the Seventh Circuit warrants review by the Supreme Court of the United States?

2. Whether the United States Court of Appeals for the Seventh Circuit properly found that the United States District Court for the Northern District of Illinois did not abuse its discretion in denying Petitioner relief from the prior judgment entered on June 25, 1992 in favor of Respondent?

3. Whether the United States District Court for the Northern District of Illinois and United States Court of Appeals for the Seventh Circuit properly denied Petitioner's motion for appointment of counsel?

4. Whether the United States District Court for the Northern District of Illinois properly dismissed Petitioner's Complaint against Respondent by its order of June 25, 1992?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Robert Wilson, who was the Plaintiff-Appellant in the proceedings before the United States District Court for the Northern District of Illinois and before the United States Court of Appeals for the Seventh Circuit. Respondent is State Farm Fire & Casualty Company, which was the Defendant-Appellee before the United States District Court for the Northern District of Illinois and before the United States Court of Appeals for the Seventh Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Docket No.: 95-1285

Short Title: Robert Wilson v. State Farm Fire and Casualty Company

(1) The full name of every party or amicus the attorney represents in the case:

State Farm Fire and Casualty Company

(2) If such party or amicus is a corporation:

(i) Its parent corporation, if any:

State Farm Mutual Automobile Insurance Company

(ii) Its non-wholly owned subsidiaries, if any:

None

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties to the Proceeding	ii
Rule 29.6 Disclosure Statement	iii
Table of Contents	iv
Table of Citations	v
Statement of Jurisdiction	1
Statement of the Case	2
Summary of Argument	5
Reasons for Denying the Writ	6
I. Petitioner Has Failed to Establish that the Decision of September 13, 1995 of the United States Court of Appeals for the Seventh Circuit Warrants Review by the United States Supreme Court.	6
II. Petitioner Was Not Entitled to Relief From the Prior Judgment in Favor of Respondent.	9
A. Scope of Review	9
B. The Denial of Relief Under Rule 60(b) Was Proper	11

Contents

	Page
III. Petitioner's Motion to Appoint Counsel Was Properly Denied.	18
A. Standard for Appointment of Counsel in Civil Actions	18
B. Petitioner's Request for Counsel Was Properly Denied	19
IV. The District Court Properly Dismissed Petitioner's Complaint by its Order of June 25, 1992.	20
A. Petitioner's Complaint Did Not Set Forth a Valid Constitutional Claim.	21
B. The District Court Properly Declined to Review the State Court Rulings.	23
C. Petitioner's Federal Claims Are Barred by *Res Judicata*	25
Conclusion	26

TABLE OF CITATIONS

Cases Cited:

Bank v. Hartford Accident & Indemnity Co., 737 F.2d 657 (7th Cir. 1984)	14
Barkauskas v. Lane, 946 F.2d 1292 (7th Cir. 1991)	18

Contents

Page

Beard v. O'Neal, 728 F.2d 894 (7th Cir 1984), *cert. denied*, 469 U.S. 825, 105 S. Ct. 104 (1984) 25

Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969) 8

Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 98 S. Ct. 556 (1978) 8, 21

Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 25

Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214, 103 S. Ct. 1212 (1983) 18, 19

Central States, Southeast & Southeast Areas Pension Fund v. Conaway, 1991 U.S. Dist. LEXIS 15495 (N.D. Ill. 1991) 10, 11, 15

De la Torre v. Continental Insurance Co., 15 F.3d 12 (1st Cir. 1994) 8

Dickerson v. Board of Education of Ford Heights, Illinois, 32 F.3d 1114 (7th Cir. 1994) 11, 15

Harold Washington Party v. Cook County, 984 F.2d 875 (7th Cir. 1993), *cert. denied*, 126 L. Ed. 2d 54, 114 S. Ct. 86 (1994) 21

Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987) 18, 19

Contents

Page

Landers Seed Company v. Champaign National Bank, 15 F.3d 729 (7th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 20, 115 S. Ct. 62 (1994) 23, 24, 25

Lassiter v. Department of Social Services, 452 U.S. 18, 68 L. Ed. 2d 640 (1981) 8

Lawline v. American Bar Association, 956 F.2d 1378 (7th Cir. 1992) 16, 22

Lokmar Yazid Abdul-Wadood v. Duckworth, 860 F.2d 280 (7th Cir. 1988), *overruled on other grounds*, 940 F.2d 243 (7th Cir. 1991) 18

Margoles v. Johns, 798 F.2d 1069 (7th Cir. 1986), *cert. denied*, 482 U.S. 905, 107 S. Ct. 2482 (1987) 11, 15

Nelson v. Redfield Lithograph Printing, 728 F.2d 1003 (8th Cir. 1984) 8

Pantoja v. Texas Gas & Transmission Corporation, 890 F.2d 955 (7th Cir. 1989), *cert. denied*, 497 U.S. 1024, 110 S. Ct. 3272 (1990) 12, 13

Reuber v. United States, 829 F.2d 133 (D.C. Cir. 1987) . 8

Scott v. Younger, 739 F.2d 1464 (9th Cir. 1984) 8

United States v. Golden Elevator, 27 F.3d 301 (7th Cir. 1994) 10

Contents

Page

United States v. Payne, 741 F.2d 887 (7th Cir. 1984) ... 11

Wesco Products Co. v. Alloy Auto Company, 880 F.2d 981 (7th Cir. 1989) ... 14

Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523 (N.D. Ill. 1990) ... 16, 22

Williams v. Hatcher, 840 F.2d 993 (7th Cir. 1989) ... 11, 17

Statutes Cited:

28 U.S.C. § 1331 ... 1

42 U.S.C. § 1983 ... 23

United States Constitution Cited:

Fourteenth Amendment ... 1, 3, 20

Rules Cited:

Federal Rule of Civil Procedure 12(b) ... 15, 19

Federal Rule of Civil Procedure 60(b) ... 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 21

Federal Rule of Civil Procedure 60(b)(2) ... 14

Federal Rule of Civil Procedure 60(b)(3) ... 13, 15, 16

Federal Rule of Civil Procedure 60(b)(4) ... 14

Contents

	Page
Supreme Court Rule 10	6
Supreme Court Rule 13.1	2
Supreme Court Rule 13.4	2

STATEMENT OF JURISDICTION

The Respondent believes Petitioner's Statement of Jurisdiction to be incomplete and therefore files the following jurisdictional statement.

On or about March 12, 1992, Petitioner, Robert Wilson, filed a complaint against Respondent, State Farm Fire & Casualty Company, in the United States District Court for the Northern District of Illinois, entitled *Wilson v. State Farm Fire & Casualty Company*, and docketed to No. 92 C 1770. In his complaint, Petitioner alleged violations of due process and equal protection under the Fourteenth Amendment to the United States Constitution. Accordingly, Petitioner alleged that subject matter jurisdiction in the United States District Court was based upon the provisions of 28 U.S.C. § 1331 (federal question jurisdiction). The United States District Court dismissed Petitioner's action on June 25, 1992 and, on appeal, the United States Court of Appeals for the Seventh Circuit summarily affirmed the decision of the United States District Court by an unpublished order dated September 30, 1992.

On or about June 9, 1994, Petitioner filed two motions with the United States District Court for the Northern District of Illinois. Petitioner filed a motion to present a jurisdictional question, which raised two issues: (1) whether the District Court had jurisdiction to dismiss his complaint on June 25, 1992 when "there is no claim filed, and there is no defendant without a claim;" and (2) whether the District Court's dismissal of the complaint by order dated June 25, 1992 deprived Petitioner of due process and equal protection of the law. Petitioner also filed a motion for appointment of counsel.

Both of Petitioner's motions were denied by the United States District Court by order dated June 27, 1994. On July 5,

1994, Petitioner filed a motion to withhold ruling on the motion to present a jurisdictional question until the motion for appointment of counsel was resolved. This motion was denied by the District Court by order dated July 6, 1994.

Petitioner thereafter filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. By order dated September 13, 1995, the United States Court of Appeals for the Seventh Circuit determined that the District Court did not abuse its discretion in denying Petitioner's Motion to Vacate the judgment of June 25, 1992. Furthermore, the United States Court of Appeals concluded that the District Court did not abuse its discretion in denying Petitioner's Motion for Appointment of Counsel.

Petitioner filed a petition for rehearing which was denied by the United States Court of Appeals for the Seventh Circuit by order dated December 13, 1995. Accordingly, this Honorable Court has jurisdiction to review the decision of the United States Court of Appeals dated September 13, 1995 pursuant to Supreme Court Rule 13.1 and 13.4.

STATEMENT OF THE CASE

The Respondent also believes that Petitioner's Statement of the Case to be materially incorrect and, therefore, files the following Statement of the Case, setting forth the pertinent factual and procedural background.

On or about March 12, 1992, Petitioner commenced an action against Respondent in the United States District Court for the Northern District of Illinois. In his complaint, Petitioner alleged that on or about February 7, 1983, he renewed his homeowner's insurance for coverage on property located at 15420 South Vine Street, Harvey, Illinois and that on June 27,

1983, a tenant damaged his property. Petitioner further alleged that his claim with Respondent was denied or about March 5, 1986 and that by reason of the denial of his claim by Respondent, he had been denied due process and equal protection under the Fourteenth Amendment of the United States Constitution.[1]

Petitioner's complaint was dismissed with prejudice by the United States District Court on June 25, 1992, on the grounds that Petitioner had not set forth any valid constitutional claim. The decision of the United States District Court was thereafter affirmed by the United States Court of Appeals for the Seventh Circuit on September 30, 1992.

On or about June 9, 1994, Petitioner filed with the United States District Court motions to present a jurisdictional question and motion for appointment of counsel. Petitioner's motion to present a jurisdictional question raised two issues: (a) whether the District Court had jurisdiction to dismiss the complaint on June 25, 1992 when "there is no claim filed, and there is no defendant without a claim;" and (b) whether the District Court's

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1. Prior to his federal court action, Petitioner filed an action arising out of the same loss of June 27, 1983 against Respondent in the Circuit Court of Cook County on or about March 3, 1987, docketed to No. 87 CH 2006. Petitioner's state court action was dismissed with prejudice by the Circuit Court of Cook County, Illinois on November 16, 1988 on the basis that Petitioner failed to file his action within one year of the date of loss in compliance with the provisions of the policy of insurance. The Circuit Court of Cook County also denied Petitioner's motion to reconsider on January 20, 1989. The dismissal of Petitioner's complaint was subsequently affirmed by the Appellate Court of Illinois for the First District, Third Division on May 23, 1990. The Appellate Court of Illinois also denied Petitioner's petition for rehearing on October 31, 1990. The Illinois Supreme Court thereafter denied Petitioner's petition for leave to appeal by order dated February 6, 1991. Finally, Petitioner filed a petition for writ of certiorari, which was denied by the United States Supreme Court on October 7, 1991.

dismissal of the complaint by order dated June 25, 1992 deprived Petitioner of due process and equal protection.

Both of Petitioner's motions were denied by the United States District Court by order dated June 27, 1994. The District Court construed Petitioner's motion as a motion for relief from judgment pursuant to F.R.C.P. 60(b) and concluded that such motion was untimely. The District Court further determined that even if said motion was timely, Petitioner's allegations of fraud on the part of Respondent would not form the basis of a due process or equal protection claim.

On or about July 5, 1994, Petitioner filed a motion to withhold ruling on his motion to present a jurisdictional question until the motion for appointment of counsel was resolved. Petitioner's motion to withhold ruling was denied by the United States District Court by order dated July 6, 1994.

Petitioner thereafter appealed to the United States Court of Appeals for the Seventh Circuit. In conjunction with his appeal, Petitioner filed a motion to appoint counsel on July 29, 1994, however, the Court of Appeals denied that motion by order dated December 6, 1994.

By order dated September 13, 1995, the Court of Appeals concluded that Petitioner's motion to present a jurisdictional question was properly construed by the District Court as a motion for relief under F.R.C.P. 60(b). Furthermore, the Court of Appeals held that the motion was untimely since the motion was not filed within one year of the judgment from which relief was sought. Moreover, the Court of Appeals concluded that the District Court did not abuse its discretion in denying Petitioner's motion for relief from the prior judgment. Finally, the Court of Appeals upheld the District Court's denial of Petitioner's motion for appointment of counsel.

Although Petitioner filed a petition for rehearing, it was denied by the Seventh Circuit Court of Appeals by order dated December 13, 1995.

SUMMARY OF ARGUMENT

Initially, Respondent asserts that Petitioner has not demonstrated that the decision rendered by the United States Court of Appeals for the Seventh Circuit dated September 13, 1995 warrants review by this Honorable Court. Petitioner has not established that the Seventh Circuit Court of Appeals rendered a decision in conflict with the decision of another United States court of appeals on the same question, nor has he shown that the Seventh Circuit Court of Appeals has decided a federal question in a way in conflict with a state court of last resort and/or with the decisions of this Court. Moreover, Petitioner has not established that this case presents an important question of federal law that has not been, but should be, decided by this Court.

Although Petitioner appears to argue in his Petition for Writ of Certiorari that the Court of Appeals, in reaching its decision of September 13, 1995, departed so far from the accepted and usual course of judicial proceedings that this Court must exercise its supervisory power, review of the decision discloses that this matter was clearly decided by the court fully in accordance with existing federal case law.

Furthermore, for the reasons more fully outlined below, Respondent contends that the court below properly determined that Petitioner was not entitled to relief from the prior District Court judgment of June 25, 1992 *and* that he was not entitled to appointed counsel. Again, the decision of the Court of Appeals was entirely consistent with applicable federal precedent.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH THAT THE DECISION OF SEPTEMBER 13, 1995 OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WARRANTS REVIEW BY THE UNITED STATES SUPREME COURT.

Initially, Respondent notes that Petitioner has failed to demonstrate that the Seventh Circuit Court of Appeals' ruling of September 13, 1995 merits review by this Court. United States Supreme Court Rule 10 sets forth the various criteria which may be considered by the United States Supreme Court in deciding whether to grant a petition for writ of certiorari. These criteria include, but are not limited to: (1) whether the federal Court of Appeals has decided the case in conflict with the decision of another federal Court of Appeals on the same matter; (2) whether the federal Court of Appeals has decided a federal question in a way that is in conflict with a decision of a state court of last resort; (3) whether the federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court; or (4) whether the federal Court of Appeals has decided an important question of federal law which has not been but should be settled by the United States Supreme Court or has decided a federal question in conflict with applicable decisions of the United States Supreme Court.

It would appear that Petitioner argues, under United States Supreme Court Rule 10, that the federal District Court and/or Seventh Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings that the exercise of the Supreme Court's power is necessary. Specifically, Petitioner

appears to argue that the courts below did not require proper jurisdiction before deciding this case because he asserts that he never filed a claim with Respondent.

However, Petitioner cites no pertinent case law in support of this proposition. Moreover, as the Seventh Circuit Court of Appeals correctly noted, Petitioner "submitted his dispute with State Farm concerning his coverage to the District Court. He cannot now change his tune and claim that the basis of his own suit is questionable." Thus, clearly, Petitioner has not established that the Seventh Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings.

Furthermore, Petitioner has cited *no* federal case law which would demonstrate that the Seventh Circuit Court of Appeals rendered a decision in this matter which conflicts with the decision of another federal Court of Appeals on the same question. Nor has Petitioner cited any federal or state case law which shows that the ruling of the Seventh Circuit Court of Appeals on a federal question conflicts with the ruling of a state court of last resort. Furthermore, Petitioner has cited *no* case law demonstrating that the Seventh Circuit Court of Appeals decided a federal question in conflict with the decisions of this court.

Finally, the questions presented in this case regarding when relief under F.R.C.P. 60(b) is appropriate as well as the right of a litigant to counsel in a civil case have previously been ruled upon in a similar manner by this court and/or other federal Courts of Appeals. In fact, the decision of the Seventh Circuit Court of Appeals in this case is entirely compatible with applicable federal precedent.

For example, other federal Courts of Appeals, as well as this court, have applied an abuse of discretion standard in determining whether a federal district court properly denied

relief under F.R.C.P. 60(b). *See Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263, 98 S. Ct. 556 (1978); *De la Torre v. Continental Insurance Co.*, 15 F.3d 12, 14 (1st Cir. 1994); *Reuber v. United States*, 829 F.2d 133, 141 (D.C. Cir. 1987). Additionally, Respondent notes that, like the Seventh Circuit Court of Appeals in the present case, the Court of Appeals for the Ninth Circuit has held that a one year limitation applies to motions for relief under F.R.C.P. 60(b) when based upon fraud. *Scott v. Younger*, 739 F.2d 1464 (9th Cir. 1984).

Furthermore, the ruling of the Seventh Circuit Court of Appeals with respect to Petitioner's request for appointment of counsel is likewise consistent with applicable federal precedent. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 68 L. Ed. 2d 640 (1981). In *Lassiter*, this Court held that the trial court did not err in refusing to appoint counsel in a proceeding to terminate parental rights. The court in *Lassiter* noted that under the Due Process Clause, an indigent litigant has the right to court-appointed counsel only when, if he loses, he may deprived of personal liberty. *Lassiter*, 452 U.S. at 26.

Similarly, in *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1004 (8th Cir. 1984), the Eighth Circuit Court of Appeals noted that there is no constitutional or statutory right for an indigent litigant to have counsel appointed in a civil case. *See also Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969).

Because Petitioner has not demonstrated that the decision of the Seventh Circuit Court of Appeals warrants review by this Court, the Petition for Writ of Certiorari should be denied.

II.

PETITIONER WAS NOT ENTITLED TO RELIEF FROM THE PRIOR JUDGMENT IN FAVOR OF RESPONDENT.

As set forth above, Petitioner filed two motions on or about June 9, 1994. These motions were construed by the United States District Court as a motion for relief from judgment pursuant to F.R.C.P. 60(b). The District Court denied Petitioner relief from its prior judgment of June 25, 1992 entered in favor of Respondent, holding that Petitioner's motion was untimely. The District Court further concluded that even if Petitioner's motion was deemed to be timely filed, the allegations of fraud on the part of Respondent would not form the basis of a due process or equal protection claim.

On appeal, the United States Court of Appeals upheld the determination of the District Court. For the reasons set forth below, Respondent asserts that the Court of Appeals correctly determined that Petitioner was not entitled to relief under F.R.C.P. 60(b).

A. Scope of Review

F.R.C.P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

This Rule further provides that a motion pursuant to Rule 60(b) shall be made within a reasonable time, and for reasons (1), (2), and (3), the motion must be made no more than one year after the judgment, order or proceeding was entered or taken. *See United States v. Golden Elevator*, 27 F.3d 301, 303 (7th Cir. 1994); *Central States, Southeast & Southeast Areas Pension Fund v. Conaway*, 1991 U.S.Dist. LEXIS 15495 (N.D. Ill. 1991) (motion made under subsections 1-3 must be made within one year after judgment or order entered; as to all Rule 60(b) subsections, the motion must be made within a reasonable time).

Whether a motion for relief from judgment has been filed within a reasonable period of time must be determined by

examining the particular facts of each case, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the prejudice to the other party if the judgment is revisited. *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986), *cert. denied*, 482 U.S. 905, 107 S. Ct. 2482 (1987).

A motion to vacate a judgment or order pursuant to Rule 60(b) is addressed to the sound discretion of the district court and the denial of a Rule 60(b) motion may be reversed only when the district court has abused its discretion. *Williams v. Hatcher*, 840 F.2d 993, 995 (7th Cir. 1989). Abuse of discretion in denying a Rule 60(b) motion is established only when no reasonable person could agree with the district court; there is no abuse of discretion if a reasonable person could not disagree as to the propriety of the court's action. *Williams*, 840 F.2d at 995; *see also United States v. Payne*, 741 F.2d 887, 895 (7th Cir. 1984) (abuse of discretion standard to be applied when reviewing district court's denial of relief under Rule 60(b)).

Furthermore, Rule 60(b) is an extraordinary remedy and should be granted only in exceptional circumstances. *Dickerson v. Board of Education of Ford Heights, Illinois*, 32 F.3d 1114, 1116 (7th Cir. 1994); *Central States, Southeast & Southeast Areas Pension Fund v. Conaway*, 1991 U.S.Dist. LEXIS 15495 (N.D. Ill. 1991). There is a strong policy in favor of the finality of judgments; judgments in civil cases fix the rights of the parties and entitle them to go about their live and may be re-opened only for extraordinary reasons. *Margoles v. Johns*, 798 F.2d 1069, 1072 (7th Cir. 1986), *cert. denied*, 482 U.S. 905, 107 S. Ct. 2482 (1987).

B. The Denial of Relief under Rule 60(b) Was Proper

With the foregoing scope of review in mind, Respondent asserts that the Court of Appeals properly determined that

Petitioner was not entitled to relief from the prior judgment in favor of Respondent entered on June 25, 1992.

As stated by the District Court in its opinion, to the extent that Petitioner was seeking relief under subsection 3 of Rule 60(b) based upon the alleged fraud or misconduct of an adverse party, such motion was untimely. As set forth above, the District Court previously dismissed Petitioner's complaint with prejudice on June 25, 1992 and this decision was summarily affirmed by the Court of Appeals on September 30, 1992. Petitioner's motions of June 9, 1994 alleged that Respondent fraudulently denied him coverage under a policy of insurance. However, Petitioner's motion of June 9, 1994 was not filed until almost two years had elapsed after the District Court dismissed his complaint. Accordingly, the District Court determined, and the Court of Appeals properly affirmed, that because Petitioner's motion was based upon alleged fraud on the part of Respondent, Petitioner's motion was untimely since it was filed more than one year after the prior judgment was entered. *Pantoja v. Texas Gas & Transmission Corporation*, 890 F.2d 955, 960 (7th Cir. 1989), *cert. denied*, 497 U.S. 1024, 110 S. Ct. 3272 (1990).

In *Pantoja v. Texas Gas & Transmission Corp.*, 890 F.2d 955 (7th Cir. 1989), the plaintiffs filed an action in state court alleging that the defendants discharged them in retaliation for filing and pursuing an earlier lawsuit against them in federal court in 1977. The defendants removed the case to federal court and the district court subsequently dismissed the complaint on the basis that the plaintiffs failed to exhaust their grievance remedies under the parties' collective bargaining agreement and because the statute of limitations had expired.

The plaintiffs in *Pantoja* then filed a motion to vacate which, in part, attacked the prior judgment entered in 1977, alleging that the prior judgment was obtained through fraud on

the part of their own attorney and that the district court judge improperly failed to recuse himself in the 1977 action. The district court denied the plaintiffs' motion to reconsider the 1977 judgment.[2] The district court held that under Rule 60(b), a motion for relief from judgment based upon fraud on the part of an adverse party must be made within one year from the entry of the judgment or order. Thus, the district court concluded that the plaintiffs' motion for relief from the prior judgment was untimely and, further, determined that no reasonable person could question the district judge's impartiality.

On appeal, the Seventh Circuit Court of Appeals affirmed, holding that plaintiffs' Rule 60(b) motion was untimely since Rule 60(b)(3) only allows the court to afford relief from a judgment on the basis of fraud/misconduct of an adverse party if the motion is made within one year of the judgment. *Pantoja*, 890 F.2d at 960. The Court also concluded that to the extent that plaintiffs sought to introduce newly discovered evidence, the motion was likewise untimely filed. *Id.* at 960.

The Court of Appeals in *Pantoja* also held that Rule 60(b)(6) did not afford the plaintiffs any basis for relief, noting that this subsection is to be employed only in the most extraordinary circumstances. *Id.* at 960. The Court of Appeals further held that

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2. In the 1977 suit, the plaintiffs alleged that the defendants breached the collective bargaining agreement. The plaintiffs also claimed that the union breached its duty of fair representation. The district court granted the union's motion for summary judgment since plaintiffs failed to exhaust their internal union remedies. After a bench trial, the district court entered judgment in January 1981 in favor of the defendant employers. The Seventh Circuit affirmed in an unpublished opinion of September 1, 1982 and the United States Supreme Court denied the plaintiffs' petition for writ of certiorari. In November or December 1979, while the case was still pending before the district court, the plaintiffs were laid off from their jobs and eventually were terminated pursuant to the collective bargaining agreement.

even if the plaintiffs' allegations of fraud and misconduct on the part of their attorney were true, Rule 60(b) could not be utilized to address the plaintiffs' situation. Finally, the Court held that there was no basis for concluding that the district court judge in the 1977 action improperly failed to recuse himself.

To the extent that Petitioner in the present case seeks relief from the prior judgment in favor of Respondent based upon newly discovered evidence under subsection 2 of Rule 60(b), such motion is likewise untimely. Moreover, Petitioner has not alleged any facts which would entitle him to relief under Rule 60(b)(2). A motion for relief under Rule 60(b)(2) based upon newly discovered evidence requires the movant to show: (a) due diligence in discovering the evidence; (b) the evidence is material; (c) the evidence is not cumulative; (d) the evidence was discovered after trial; and (e) the newly discovered evidence would produce a different result. *Bank v. Hartford Accident & Indemnity Co.*, 737 F.2d 657, 662 (7th Cir. 1984). In the present case, review of Petitioner's motions filed on June 9, 1994 makes clear that Petitioner has not demonstrated entitlement to relief under Rule 60(b)(2) as he had not made the requisite showing of all of the elements set forth in *Bank v. Hartford Indemnity*, 737 F.2d at 662.

Additionally, Petitioner is not entitled to relief under subsections 4 or 6 of Rule 60(b). Rule 60(b)(4) authorizes the district court to grant relief from a judgment or order which is void. A void judgment or order, for purposes of Rule 60(b)(4), is a judgment or order entered by a court without jurisdiction or in contravention of due process. *Wesco Products Co. v. Alloy Auto Company*, 880 F.2d 981, 984 (7th Cir. 1989).

Unquestionably, Petitioner submitted himself to the jurisdiction of the United States District Court in the present case when he filed his complaint on March 12, 1992, alleging that

Respondent deprived him of the right to file a claim for the alleged property damage and thereby violated his constitutional rights of due process and equal protection. After Respondent filed a motion to dismiss that complaint, as expressly allowed by Rule 12(b) of the Federal Rules of Civil Procedure, the District Court granted Respondent's motion on June 25, 1992 and dismissed Petitioner's complaint with prejudice. Petitioner then submitted himself to the Court of Appeals' jurisdiction by appealing the decision of the District Court dismissing his complaint. Under these circumstances, it cannot be said that the judgment of the District Court of June 25, 1992 was entered without jurisdiction or in contravention of due process. Therefore, the judgment of June 25, 1992 was not void.

Finally, Petitioner's motions did not afford a basis for relief under Rule 60(b)(6). As set forth above, Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances. *Dickerson v. Board of Education of Ford Heights, Illinois*, 32 F.3d 1114, 1116 (7th Cir. 1994); *Central States, Southeast & Southeast Areas Pension Fund v. Conaway*, 1991 U.S.Dist. LEXIS 15495 (N.D. Ill. 1991). Furthermore, Rule 60(b)(6), in particular, requires a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust. Relief under Rule 60(b)(6) is *only* available when the other subsections of Rule 60(b) are inapplicable. *Margoles v. Johns*, 798 F.2d 1069, 1072 (7th Cir. 1986), *cert. denied*, 482 U.S. 905, 107 S. Ct. 2482 (1987).

In the present case, because Petitioner's motion alleged fraud or misconduct on the part of Respondent, relief under Rule 60(b)(6) is not available as subsection (b)(3) would otherwise apply. As noted above, motions under Rule 60(b)(3) are subject to the one year filing limitation. Thus, Respondent asserts that the District Court correctly concluded, and the Court of Appeals properly affirmed, that Petitioner's motion was untimely filed

since the motion was based upon the alleged fraud of Respondent. Therefore, Petitioner was correctly precluded by the courts below from circumventing the one year filing limitation of subsection (b)(3) in this matter and was not entitled to relief under subsection (b)(6).

Furthermore, as correctly stated by the District Court, even if Petitioner's motion was considered timely filed, his allegations of fraud on the part of Respondent would not form the basis of a due process or equal protection claim. As a general rule, a plaintiff alleging a violation of civil rights must establish that the defendant was acting under color of state law. *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992). Although a conspiracy between private citizens and state officials may be a basis for holding a private citizen liable for violation of civil rights, bald allegations of conspiracy are insufficient to state a claim against a private citizen. Rather, the plaintiff must allege specific facts showing that the state officials and the private party reached an understanding to deny the plaintiff of his constitutional rights. *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990).

In the present case, neither Petitioner's original complaint filed with the District Court on March 12, 1992 nor his motions filed on June 9, 1994 contained allegations which, if proven, would establish that Respondent was acting under color of state law. Nor did Petitioner set forth specific facts which would establish a conspiracy between state actors and the Respondent.

Finally, Petitioner's original complaint as well as his June 9, 1994 motions failed to set forth any facts, which if proven, would establish that Respondent deprived him of a constitutionally protected right. The dismissal of Petitioner's cause of action against Respondent (based upon his failure to file suit within the suit filing limitation of the insurance policy) did not violate

Petitioner's constitutional right to file a claim. The "right" to file a claim pursuant to a policy of insurance is not a matter governed by the due process clause of the United States Constitution. Rather, any such "right" is contractual in nature and governed by the terms and conditions of the policy of insurance. The Circuit Court of Cook County, Illinois dismissed Petitioner's complaint based upon his violation of the terms and conditions of the policy. Petitioner was afforded due process; he sued, appealed, and lost, but he had his day in court.

Respondent also notes that as part of his argument that he was fraudulently deprived of his right to file a claim, Petitioner asserted that counsel for the Respondent "misrepresented this case" and, as a result, Respondent terminated the services of Attorney Frederick J. Sudekum, and the law firmof Querrey & Harrow. Clearly, Petitioner's assertions on this point are incorrect as Mr. Sudekum as well as the law firmof Querrey & Harrow have continued to represent Respondent in this matter, as evidenced by the various documents filed on behalf of Respondent.

Based upon the foregoing reasons, Respondent asserts that the Seventh Circuit Court of Appeals properly held that the District Court did not abuse its discretion in determining that Petitioner was not entitled to relief from the prior judgment of June 25, 1992 in favor of Respondent.[3] Accordingly, Respondent contends that the Court of Appeals' decision of September 13, 1995, affirming the District Court's denial of relief from the June 25, 1992 judgment, was proper in all respects. *Williams v. Hatcher*, 840 F.2d 993 (7th Cir. 1989).

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3. Respondent also contended that in June 1994, the District Court had no jurisdiction to review the merits of the June 25, 1992 order dismissing Plaintiff's complaint since the order of June 25, 1992 was previously affirmed by the Court of Appeals for the Seventh Circuit by order of September 30, 1992.

III.

PETITIONER'S MOTION TO APPOINT COUNSEL WAS PROPERLY DENIED.

In conjunction with his motions filed with the District Court on June 9, 1994, Petitioner also sought the appointment of counsel to represent him in this matter. Petitioner's request for the appointment of counsel was denied by the District Court on July 6, 1994. Petitioner thereafter appealed to the Court of Appeals for the Seventh Circuit, which held that the District Court did not abuse its discretion in denying the request for counsel. Respondent asserts that the motions for appointment of counsel were properly denied by the Court of Appeals as well as by the District Court.

A. Standard for Appointment of Counsel in Civil Actions

Initially, Respondent notes that there is no constitutional right to court-appointed counsel in a civil action. *Barkauskas v. Lane*, 946 F.2d 1292, 1294 (7th Cir. 1991); *Lokmar Yazid Abdul-Wadood v. Duckworth*, 860 F.2d 280 (7th Cir. 1988), *overruled on other grounds*, 940 F.2d 243 (7th Cir. 1991); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214, 103 S. Ct. 1212 (1983). The District Court has discretion to appoint counsel for a civil rights litigant and the refusal to appoint counsel will only be overturned when it results in fundamental unfairness impinging on the litigant's due process rights. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

In determining whether counsel should be appointed, the District Court may consider: (1) the petitioner's ability to investigate the facts; (2) whether the only evidence consists of conflicting testimony which would require effective cross-

examination; (3) the ability of the petitioner to present his case without counsel; and (4) the complexity of the legal issues involved. *Howland v. Kilquist*, 833 F.2d at 646.

The court must also consider the merits of the litigant's claim from a legal and factual standpoint; the court need not appoint counsel when it considers the litigant's chances of success extremely slim. *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214, 103 S. Ct. 1212 (1983). In *Caruth*, the plaintiff was an inmate who was removed from his job as a law clerk at a prison law library for alleged unauthorized use of the library photocopier machine. The plaintiff then brought a civil rights action against certain prison officials, alleging that he was improperly removed from his job. The plaintiff in *Caruth* also requested that counsel be appointed to represent him in his civil rights action. The district court denied his motion and the Seventh Circuit Court of Appeals affirmed, holding that the facts and issues alleged were not of such complexity, controversy, or merit to entitle the plaintiff to appointment of counsel. *Caruth*, 683 F.2d at 1050.

B. Petitioner's Request for Counsel Was Properly Denied

In the present case, application of the above-cited factors to the facts and posture of this case leads to the conclusion that Petitioner's request for the appointment of counsel was properly denied, both by the District Court as well as by the Seventh Circuit Court of Appeals. First, examination of the facts and legal issues presented by Petitioner's June 9, 1994 motions revealed a slim chance of success on the merits, particularly in light of the District Court and Seventh Circuit Court of Appeals' previous rulings in this matter.

Moreover, Petitioner's complaint was dismissed by the District Court pursuant to Respondent's Rule 12(b) motion. Thus, this case did not involve conflicting evidence requiring

effective cross-examination. Additionally, Petitioner chose to proceed *pro se* at the hearing of June 25, 1992 at which time the District Court dismissed his complaint. Petitioner then waited approximately two years to file his motions of June 9, 1994, including his request for the appointment of counsel. Finally, the legal issues raised by Petitioner's complaint, as well as his motions filed on June 9, 1994, are not of such complexity or merit so as to require the appointment of counsel.

Moreover, the Seventh Circuit Court of Appeals, in its opinion of September 13, 1995, noted that Petitioner demonstrated that he was "quite capable of making arguments and pursuing his suits in both State and Federal court." Accordingly, Respondent asserts that the District Court and Seventh Circuit Court of Appeals did not abuse its discretion in denying Petitioner's request for appointment of counsel.

IV.

THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT BY ITS ORDER OF JUNE 25, 1992.

As set forth above, Petitioner filed his complaint in the District Court on or about March 12, 1992, alleging a violation of his constitutional right to due process and equal protection pursuant to the Fourteenth Amendment of the United States Constitution. In its opinion and order of June 25, 1992 dismissing Petitioner's complaint, the District Court stated that Petitioner alleged that he was denied due process and equal protection because the Illinois Circuit Court barred him from filing a claim. However, the District Court concluded that Petitioner was not barred from filing a claim by the Circuit Court, but by the applicable insurance policy conditions. The District Court also determined that Petitioner failed to set forth any valid

constitutional claim for the denial of due process or equal protection, concluding that the state court proceedings afforded Petitioner due process and equal protection. By order dated September 30, 1992, the Seventh Circuit Court of Appeals summarily affirmed the decision of the District Court dismissing Petitioner's complaint.

Because the Seventh Circuit Court of Appeals, by its order of September 30, 1992, previously addressed and affirmed the propriety of the District Court's order of June 25, 1992 dismissing Petitioner's complaint, Respondent contends that the Seventh Circuit Court of Appeals, when it rendered its decision of September 13, 1995, properly declined to re-examine the underlying ruling.

Moreover, Respondent contends that this court need not and should not examine the underlying decision of June 25, 1992 dismissing Petitioner's complaint, particularly since Petitioner did not appeal from the Seventh Circuit Court of Appeals' order of September 30, 1992. An appeal from the denial of a Rule 60(b) motion does not trigger appellate review of the merits of the underlying judgment. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263, 98 S. Ct. 556 (1978); *Harold Washington Party v. Cook County*, 984 F.2d 875, 880 (7th Cir. 1993), *cert. denied*, 126 L. Ed. 2d 54, 114 S. Ct. 86 (1994).

However, even assuming that this Court chooses to re-examine the District Court's June 25, 1992 ruling, Respondent maintains that the District Court properly dismissed Petitioner's Complaint by its order of June 25, 1992.

A. Petitioner's Complaint Did Not Set Forth a Valid Constitutional Claim.

As set forth above, a plaintiff alleging a violation of civil rights must establish that the defendant was acting under color of

state law. *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992). Although a conspiracy between private citizens and state officials may be a basis for holding a private citizen liable for violation of civil rights, bald allegations of conspiracy are insufficient to state a claim against a private citizen. Rather, the plaintiff must allege specific facts showing that the state officials and the private party reached an understanding to deny the plaintiff of his constitutional rights. *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990).

In the present case, Petitioner's complaint did not contain allegations which, if proven, would establish that Respondent was acting under color of state law. Nor did Petitioner set forth specific facts which would establish a conspiracy between state actors and the Respondent. Finally, Petitioner's complaint failed to set forth any facts, which if proven, would establish that Respondent deprived him of a constitutionally protected right.

Moreover, Petitioner's original complaint as well as his June 9, 1994 motions fail to set forth any facts, which if proven, would establish that Respondent deprived him of a constitutionally protected right. The dismissal of Petitioner's cause of action against Respondent based upon his failure to file suit within the suit filing limitation of the insurance policy did not violate Petitioner's constitutional right to file a claim. The "right" to file a claim pursuant to a policy of insurance is not a matter governed by the due process clause of the United States Constitution. Rather, any such "right" is contractual in nature and governed by the terms and conditions of the policy of insurance. The Circuit Court of Cook County dismissed Petitioner's complaint based upon his violation of the terms and conditions of the policy. Petitioner was afforded due process; he sued, appealed, and lost, but, again, he had his day in court.

B. The District Court Properly Declined to Review the State Court Rulings.

Moreover, the District Court properly declined to review the prior rulings made by the Illinois state courts in this matter. A federal district court, except in limited circumstances, does not have the authority to review state court determinations. *Landers Seed Company v. Champaign National Bank*, 15 F.3d 729 (7th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 20, 115 S. Ct. 62 (1994). In *Landers*, the bank sued the defendant, Landers Seed, in state court to collect on a promissory note. The defendant filed a counterclaim for breach of contract. The jury made an award in favor of each party, however, on appeal, the Illinois Appellate Court reversed the judgment in favor of the defendant for insufficiency of evidence. The defendant filed a petition for rehearing which was denied by the Illinois Appellate Court and, thereafter, filed a petition for leave to appeal which was denied by the Illinois Supreme Court. The defendant's petition for writ of certiorari was denied by the United States Supreme Court. All of these petitions alleged that the Appellate Court's reversal of the judgment on the counterclaim violated the defendant's due process rights. *Landers Seed*, 15 F.3d at 730.

The defendant in the state court actions then filed a motion for relief from judgment with the state trial court, which was denied; the denial of relief was then affirmed by the Illinois Appellate Court. The Illinois Appellate Court also denied the defendant's request for rehearing and, finally, the Illinois Supreme Court denied leave to appeal.

The defendant in *Landers Seed* then sued the bank in federal district court under 42 U.S.C. § 1983. The District Court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Seventh Circuit Court of Appeals affirmed, holding that the plaintiff (the defendant in the prior state court proceedings) was essentially asking the District Court to

invalidate a state court judgment. The Seventh Circuit Court of Appeals held that except in limited circumstances, a federal district court does not have the authority to review state court determinations. *Landers Seed*, 15 F.2d at 732.

The Seventh Circuit in *Landers Seed* held that a district court may preside over challenges to state court rules if review does not require review of a final state court judgment in a particular case. *Landers Seed*, 15 F.3d at 732. However, the Seventh Circuit held that when constitutional claims presented to the District Court are inextricably intertwined with a state court's denial in a judicial proceeding of a particular plaintiff's claim, then the district court is, in essence, being called upon to review the state court's decision and this it may not do. *Landers Seed*, 15 F.3d at 732. In *Landers Seed*, the Seventh Circuit Court of Appeals concluded that the claims made and the relief sought by the plaintiff in the federal district court were inextricably intertwined with the earlier state court judgments and that the federal district court therefore properly dismissed the complaint for lack of subject matter jurisdiction. 15 F.3d at 733.

The state court procedural background in the present matter is similar to that outlined above in *Landers Seed*. As set forth in Respondent's Statement of the Case, prior to bringing his federal court action, Petitioner filed an action arising out of the same loss against Respondent in the Circuit Court of Cook County Illinois on or about March 3, 1987, docketed to No. 87 CH 2006. Petitioner's state court action was dismissed with prejudice by the Circuit Court of Cook County on the basis that Petitioner failed to file his action within one year of the date of loss in compliance with the provisions of the policy of insurance. Petitioner's contention that he was denied the right to file a claim is belied by the court's ruling in the state action, as the court determined that Petitioner did present a claim to Respondent under his insurance policy and the claim was properly denied by the Respondent. Thus, the

question of whether Petitioner made a claim under the policy was resolved long ago by the state court.

The dismissal of Petitioner's complaint was subsequently affirmed by the Appellate Court of Illinois for the First District on May 23, 1990. The Illinois Supreme Court thereafter denied Petitioner's petition for leave to appeal by order dated February 6, 1991. Finally, Petitioner's petition for writ of certiorari was denied by the United States Supreme Court on October 7, 1991.

As in *Landers Seed*, those state court judgment were "inextricably intertwined" with the claims made and the relief later sought by the Petitioner in federal court. Based upon the above holding in *Landers Seed*, Respondent asserts that the United States District Court had no authority to review or invalidate the prior judgments of the Illinois state courts in this matter.

C. Petitioner's Federal Claims Are Barred by *Res Judicata*

Finally, Petitioner's federal action was barred by the doctrine of res judicata. Under this doctrine, a final judgment on the merits acts as a bar to further claims by the same parties based upon the same cause of action. *Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984), *cert. denied*, 469 U.S. 825, 105 S. Ct. 104 (1984). The prior judgment bars relitigation not only as to those issues that were raised and decided previously, but also as to issues that could have been raised. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir. 1983).

In the present case, the Circuit Court of Cook County, Illinois as well as the Illinois Appellate Court, rendered a decision on the merits of Petitioner's claims. Since Petitioner's claims in the United States District Court, albeit couched in "due

process" and "equal protection" language, are the same claims as those presented by him in the Illinois state courts, Petitioner's federal action was barred by res judicata.

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed by Petitioner, Robert Wilson

Respectfully submitted,

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